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Supreme Court of the United States

October Term, 1949

No. 327

ANTHONY GUSSIE,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the New Jersey Supreme Court is reported in 1 New Jersey 604. The opinion of the New Jersey Superior Court, Appellate Division, is reported in 1 New Jersey Superior Court Reports 293.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257.

Question Presented.

Whether the Superior Court of New Jersey, Appellate Division, correctly held that the Longshoremens' and Harbor Workers' Compensation Act (33 U. S. C., Sec. 901, *et seq.*) afforded an exclusive remedy to plaintiff who sought recovery under the Federal Employers' Liability Act (45 U. S. C., Sec. 51, *et seq.*).

Statement of the Case.

Petitioner at the time of his injury was a freight brakeman, in interstate commerce, in the employ of defendant as a member of crew 31-B, assisting in the unloading of freight cars from a carfloat at the Harsimus Cove Freight Yards in Jersey City. This carfloat was lying in the navigable waters of the Hudson River and was a vessel of over 450 tons net weight. At the time of injury, petitioner was stationed atop a box-car on the south track of the carfloat, giving a back-up signal to the engineer on the locomotive, which was off the carfloat and on dry land. Petitioner alleges that instead of backing up, the locomotive suddenly pulled forward with the result that he was hurled from the roof of the car down to the track below, sustaining serious personal injuries. The defendant, under the terms of the Longshoremens' and Harbor Workers' Compensation Act, is a self-insurer and carries compensation under the Act for the benefit of its employees. After the accident, it duly filed its report with the United States Employees' Compensation Commission and made payments to petitioner prior to award. These payments were never acknowledged by petitioner, nor were any compensation checks cashed by him.

The pertinent provisions of the Longshoremens' and Harbor Workers' Compensation Act are contained in Sections 903 and 905, which, insofar as material to this case, provide as follows:

> "Sec. 903 (a). Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including dry docks) and if recovery for the disability or death through workmens' compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—
>
> 1. A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; * * *
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> * * * * * * * * * *
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> "Sec. 905. The liability of an employer * * * shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

The complaint of petitioner, based on the Federal Employers' Liability Act, was dismissed by the trial court which held that the Longshoremens' and Harbor Workers' Compensation Act is applicable and affords an exclusive remedy (R. 6). The trial court was sustained by the New Jersey Superior Court, Appellate Division and by the New Jersey Supreme Court. The identical question of law has been passed on by this court and it is Respondent's contention that the petition for certiorari raises no issue warranting review by this court.

ARGUMENT.

I.

The petition for certiorari presents no reason for review by this court.

This court has indicated (Supreme Court Rule 38), that review on writ of certiorari is a matter of discretion granted only where there are special and important reasons therefor. None of the character of reasons indicated by that rule aids the petitioner herein for he seeks review of a State court decision which *follows* the applicable decision of this court (*Nogueira* v. *New York, New Haven and Hartford R. R. Co.*, 281 U. S. 128, 74 L. Ed. 754, 50 S. Ct. 303). Petitioner assigns as error relied upon, the decision of the State court, which embodies the rule hitherto laid down in the *Nogueira* case and which decides no substantial Federal question that has not already been passed upon by this court. Since the date of the *Nogueira* case, there has been no reported case decided in conflict with its unanimous holding, and petitioner cites no compelling reason for ignoring it. The petition in this case utterly lacks any persuasive force in seeking to undo what this court has so clearly and unambiguously declared to be the law.

II.

This court has already decided employees such as Petitioner must seek redress under the Longshoremens' and Harbor Workers' Compensation Act (33 U. S. C., Sec. 901, *et seq.*).

In the case of *Nogueira* v. *New York, New Haven and Hartford R. R. Co.*, 281 U. S. 128, 74 L. Ed. 754, 50 S. Ct. 303, this court was confronted squarely with the problem

presented in the instant cause. There, as here, petitioner was a railroad employee in interstate commerce, injured aboard his employer's carfloat, a vessel of over eighteen tons net weight, afloat in navigable waters. This court unanimously affirmed the judgment of the District Court for the Southern District of New York, which dismissed the action brought under the Federal Employers' Liability Act upon the ground that the Longshoremens' and Harbor Workers' Compensation Act afforded an exclusive remedy. The court noted that the Longshoremens' Act, by its very terms, embraced the situation presented to it, since the term "employer" includes a railroad company having employees in maritime employment, in whole or in part, upon navigable waters of the United States, and "employee" does not include a master or member of a crew, which petitioner was not, and the vessel was over eighteen tons net weight. It was further apparent to the court that State compensation could not be provided the petitioner, since the injury occurred within the exclusive maritime and admiralty jurisdiction which constitutes an integral part of the Federal Law under Article III, Sec. 2 of the Federal Constitution. As to the contention that railroad employees were exempt from operation of the Act, the court found (pp. 134, 136, 137):

> "No exception is made of the employees of a railroad company employed in maritime service on the navigable waters of the United States or with respect to the question whether such employment was in connection with an extension of railroad transportation.
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> * * * * * * * * *
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> "The bill, as reported to, and first passed by, the Senate, contained a provision in § 3 excepting 'an employee of a common carrier by railroad engaged in interstate or foreign commerce * * * if the injury

from which the disability or death results occurred while the employee was employed in such commerce.' Sen. Rep. No. 973, 69th Cong., 1st Sess. This exception was eliminated from the bill as finally passed.

"It is hardly necessary to go further, as the clear and constitutional requirements of the Act of Congress in the furtherance of the policy conceived to be in the interest of employees cannot be escaped by any permissible process of construction.

* * * * * * * * *

"The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, * * *; and the application of Federal laws where the employment falls within the Federal jurisdiction is manifestly a matter within the discretion of Congress."

Lastly, the Court indicated that the fact that the Act of May 17, 1928 (Chap. 612, 45 Stat. at L. 600), in applying the Longshoremens' and Harbor Workers' Compensation Act to the District of Columbia and specifically excepting from its provisions employees of a common carrier engaged in interstate or foreign commerce solely within the District, supported the view that the Act does apply to such employees elsewhere in the event of a maritime tort.

Two years after the *Nogueira* decision, *supra,* this court denied certiorari (284 U. S. 638, 76 L. Ed. 543, 52 S. Ct. 20) in the case of *Buren* v. *Southern Pacific Co.*, 50 F. (2d) 407, wherein the Court of Appeals for the Ninth Circuit affirmed a judgment of the District Court for the Southern Division of the Northern District of California that a brakeman on duty aboard the defendant railroad's ferry boat on navigable waters in interstate commerce was subject to the Longshoremens' and Harbor Workers' Compensation Act (33 U. S. C. 901, *et seq.*) to the exclusion of the Federal Employers' Liability Act (45 U. S. C. 51, *et seq.*).

Repeatedly, this court has cited the intent and meaning ascribed to the Longshoremens' and Harbor Workers' Compensation Act in the *Nogueira* decision. See, for example, the unanimous opinion of the court in *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544, and also *Davis* v. *Department of Labor of Washington,* 317 U. S. 249, 87 L. Ed. 246, 63 S. Ct. 225; *Crowell* v. *Benson,* 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285; *Warner* v. *Goltra,* 293 U. S. 155, 79 L. Ed. 254, 55 S. Ct. 46.

Thus, this court has decided the very issues herein raised and has denied certiorari to a petitioner who sought review of a judgment based on the decision of this court. Moreover, this court has never departed from the construction of the Longshoremens' Act placed on it in the *Nogueira* case. In an attempt to avoid the effect of that decision, petitioner cites the case of *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U. S. 36, 87 L. Ed. 596, 63 S. Ct. 488, as authority. His contention fails for two reasons. First: The *O'Donnell* case involved extension of the Jones Act (46 U. S. C. 688), to an injury occurring on dry land, the employer contending that the remedy for such an injury was a matter of State law. Thus, there was no question of resolution of a conflict between two Federal statutes apparently covering the same situation. Secondly, the court made it clear that it was not departing from precedent in application of the Jones Act to a seaman injured on dry land, for it said that (pp. 41, 43):

> "From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land.
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> * * * * * * * * *
>
> "It follows that the Jones Act * * * has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea * * *."

Petitioner maintains that the Longshoremens' and Harbor Workers' Compensation Act does not apply to railroad workers because they have certain basic rights given them under the Employers' Liability Act. This is, of course, an untenable argument, as no litigant has a vested right in any particular form or method of procedure; *Dohany* v. *Rogers*, 281 U. S. 362, 74 L. Ed. 904, 50 S. Ct. 299; *Crane* v. *Hahlo*, 258 U. S. 142, 66 L. Ed. 514, 42 S. Ct. 214. Since Congress enacted the Longshoremens' and Harbor Workers' Compensation Act, no litigant can complain because Congress has not seen fit to confer on him an alternative remedy.

Extension of the Employers' Liability Act by the 1939 Amendment was only in the direction of enlarging the sphere of the Act to embrace those employees who had been deprived of its benefits and placed under *State* compensation laws by restrictive judicial decisions.

As noted by the New Jersey Superior Court, Appellate Division in its decision of this case (1 N. J. Super. 293, 297):

> "When the 1939 Amendment was passed the doctrine of the Nogueira case had been long recognized and consistently followed. Congress could readily have terminated its effect if it so chose, but it has remained silent. We are not at liberty to accomplish that result by the strained construction which the Plaintiff seeks of a statutory amendment unrelated both in letter and purpose."

See also : *Shelton* v. *Thomson*, 148 F. (2d) 1 (C. C. A. 7th); *Ermin* v. *Pennsylvania R. R. Co.*, 36 F. Supp. 936 (D. C. N. Y.). Nowhere in the Amendment itself, nor in the report of the Senatorial Committee thereon, is there any reference to extension of the Act to the admiralty jurisdiction, already provided for by the Longshoremens' Act.

Petitioner also contends there exists a possible deprivation of remedy when the employee is called upon to choose his forum. The Act makes specific provision that in the event an employee mistakes his remedy and sues at law or in admiralty, rather than proceed under the Act for compensation, that his time limitation runs only from the date of termination of such suit (33 U. S. C., Sec. 913 (d)).

Lastly, it should be noted that Petitioner's argument that Congress never intended two railroad employees injured in the same transaction to have different remedies is clearly fallacious. The answer to petitioner's contention is given by this court in the *Nogueira* case, wherein it says that this is a familiar consequence of the application of different laws.

Conclusion.

In conclusion, it should be noted that:

1. Petitioner cites no compelling reason within the meaning of Supreme Court Rule 38 for the granting of review on writ of certiorari.

2. Petitioner seeks review of a State court decision which is precisely in accord with the decisions of this court.

3. The Longshoremens' Act has been correctly construed by this court in light of its legislative history and the subsequent Congressional statute, applying the same Act to the District of Columbia, with specific provision excepting railroad employees.

4. A variation in remedy is a familiar consequence of the application of different statutes, and petitioner has no cause to complain because of what Congress has done.

For the reasons that have been stated above, it is submitted that the petition for a writ of certiorari to the New Jersey Superior Court, Appellate Division, should be denied.

Respectfully submitted,

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